Supreme Court, U.S.
FILED

02 345 SEP - 3 2002

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

WILLIAM J. HITE,

Petitioner,

v.

GARY LINDSEY, Warden,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

LARRY STEINBERG
(*Counsel of Record*)
ANITA STEINBERG
ROBERT I. STEINBERG
Post Office Box 64278
Los Angeles, CA 90064
Telephone: (310) 451-9077
Facsimile: (310) 837-5782

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I.

Do not the Fifth, Sixth, and Fourteenth Amendments, including their constitutional guarantees of jury trial and due process, prohibit trial shackling, seen by and known to jurors, of a well-behaving defendant, where a physically insecure trial venue has been unnecessarily selected by the court without hearing and primarily for convenience of the court?

II.

When it is judicially found that defense counsel has been completely ineffective on important issues including trial shackling, is not the defendant constitutionally entitled to raise such questions, and the evidentiary thinness of the case, on habeas corpus?

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below.

William J. Hite, Petitioner – Appellant

Gary Lindsey, Warden, Respondent – Appellee

CORPORATE DISCLOSURE STATEMENT

No parties are corporations.

TABLE OF CONTENTS

		Page
QUESTIONS PRESENTED		i
PARTIES TO THE PROCEEDING		ii
CORPORATE DISCLOSURE STATEMENT		ii
TABLE OF AUTHORITIES		v
PETITION FOR A WRIT OF CERTIORARI		1
OPINIONS BELOW		1
I.	JURISDICTION	1
II.	CONSTITUTIONAL PROVISIONS INVOLVED	2
III.	STATEMENT OF THE CASE	2
IV.	TRIAL SHACKLING OF THE DEFENDANT WHO BEHAVES PROPERLY IS PROHIBITED UNDER THE CASES, THE CONSTITUTION AND OUR ANGLO-AMERICAN TRADITIONS	5
V.	FROM MAGNA CHARTA ON, ANGLO-AMERICAN LEGAL TRADITION HAS RIGOROUSLY FORBIDDEN SHACKLING OF A WELL-BEHAVED DEFENDANT AT TRIAL	6
VI.	CONSTITUTIONAL PRINCIPLES ENUNCIATED BY THIS COURT WOULD PROTECT THE PETITIONER, BUT HAVE NOT BEEN EXAMINED AND FOLLOWED BY THE LOWER COURTS	8
VII.	JURY KNOWLEDGE OF THE PHYSICAL RESTRAINTS ON PETITIONER WAS SUBSTANTIALLY GREATER THAN INDICATED BY THE LOWER COURTS	18

TABLE OF CONTENTS – Continued

Page

VIII. AS PART OF A SERIES OF CONSTITUTIONAL MISHAPS, THE TRIAL COURT HELD NO HEARING AT ALL ON SECURITY MEASURES; AND THEN SHACKLED DEFENDANT FOR NO REAL OR VALID REASON 21

IX. INEFFECTIVE ASSISTANCE OF DEFENSE TRIAL COUNSEL AND WEAK EVIDENCE SHOW CAUSE AND PREJUDICE, OVERCOMING PROCEDURAL DEFAULTS 24

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Crotts v. Smith, 73 F.3d 861 (9th Cir. 1996) 27, 28

Duckett v. Godinez, 667 F.3d 734 (9th Cir. 1995) 11

Estes v. Texas, 381 U.S. 532 (1965) 15

Holbrook v. Flynn, 475 U.S. 569 (1985) 11, 21

Illinois v. Allen, 397 U.S. 337 (1970) 8, 9

Lawson v. Borg, 60 F.3d 608 (9th Cir. 1995) 14

Parker v. Gladden, 385 U.S. 363 (1966) 15

Rhoden v. Rowland, 172 F.3d 633 (9th Cir. 1999) ... 12, 16, 21

Spain v. Rushen, 883 F.2d 712 (9th Cir. 1989) 12

Strickland v. Washington, 466 U.S. 668 (1984) 25, 26, 28

Wilson v. McCarthy, 770 F.2d 1482 (9th Cir. 1985) 12

CONSTITUTIONS

U.S. Const. amend. V 2, 21, 24

U.S. Const. amend VI 2, 24

U.S. Const. amend XIV 2, 21, 24

STATUTES

28 U.S.C. § 1254(1) 1

MISCELLANEOUS

American Bar Association Standards for Criminal Justice: Discovery and Trial by Jury (Third Edition), Standards 15-3.2 16

TABLE OF AUTHORITIES – Continued

Page

CALJIC Instruction 1.04 19

Coke, Sir Edward, *Institutes* (1797) 6

Hawkins, *Pleas of the Crown* (6th ed. 1787) 8

Howell's English State Trials, 979 (1650-1651)..... 7

Howell's English State Trials, 222 (1696-1697)..... 7

Howell's English State Trials, 94, 129 (1722-1725).....

PETITION FOR A WRIT OF CERTIORARI

Petitioner William J. Hite respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Opinions below are unreported.

The 31-Page Report and Recommendation of the United States Magistrate Judge is reprinted here at Appendix, Pages 9-47 (hereinafter "App. ___").

The United States District Court's Judgment, and Order Accepting and Modifying Findings and Conclusions of the Magistrate Judge is reprinted here (App. 3-8). This modified the Magistrate Judge's findings and conclusions only in further castigating the prosecutor's conduct.

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court in its Memorandum Opinion of March 19, 2002 (App. 1), saying that it "affirm(ed) for the reasons stated by the district judge and magistrate judge. . . . "

I.

JURISDICTION

A timely petition for rehearing and for suggestion of rehearing en banc was denied by the Court of Appeals on June 4, 2002 (App. 48). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

II.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person . . . shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment to the United States Constitution provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "No state shall . . . deprive any person of life, liberty or property without due process of law. . . ."

III.

STATEMENT OF THE CASE

This is a case about the unconstitutionality of a murder trial with a wrongfully shackled defendant and an ineffective defense trial counsel.

In the night of August 22, 1992, in West Los Angeles, California, in the darkness, and without being heard or seen, someone shot and killed Edward Kislo, an off-duty detective with the Los Angeles Police Department. This took place in the backyard of Fredrica Haymaker who was a previous girlfriend of petitioner.

She heard a noise in her backyard, and looked outside to see a prowler. She telephoned Kislo, a neighbor, for help. Kislo arrived at Haymaker's house with a handgun, and went out into the yard. Kislo approached the hidden prowler, said he was a police officer, and ordered the prowler out. A shot was fired, and Kislo was hit in the neck. He was pronounced dead later that night.

No one saw the face of, or positively identified, the petitioner at the scene. Resting on circumstantial evidence, the authorities arrested and charged petitioner in the Los Angeles County Superior Court with first-degree murder, in violation of California Penal Code, § 187(a).

The case was transferred for trial from the Santa Monica courthouse, which has many courtrooms, a substantial number of bailiffs, and good security arrangements, to Malibu, a municipal court courthouse. It handled minor cases and had limited security with a single bailiff in the courtroom.

At the beginning of the proceeding the trial judge ordered the petitioner to be shackled (RT 5-6), and petitioner was shackled throughout substantially all of the six-week trial which ensued. No hearing was held; the decision as to shackling was announced as a *fait accompli*.

As the United States Magistrate later found in his report in the federal habeas corpus action, petitioner's defense trial counsel did not object to the shackling at the time it was ordered by the court, nor did defense trial counsel move to have the shackles removed during the six-week trial ever.

BEST AVAILABLE COPY

The trial ran from May 26 to July 14, 1993. The petitioner testified in his own defense that he was not the shooter nor concerned with Haymaker; and that he was somewhere else when the crime was committed. The jury found the petitioner guilty. He was sentenced to a term of thirty years to life.

Petitioner appealed to the California court of appeal, and also filed a habeas corpus petition with that court. On July 2, 1996, both the appeal and the habeas corpus petition were denied. Review was denied by the California Supreme Court on October 16, 1996.

Within the prescribed year thereafter, a federal habeas corpus petition was filed and then transferred to the United States District Court for the Central District of California. This has been pursued ever since. An evidentiary hearing was held before a United States Magistrate. The Report and Recommendations of the Magistrate judge found that petitioner had been shackled without good cause and in a procedurally inadequate way; and that defense trial counsel had been ineffective. It also found that the prosecutor had behaved wrongfully in certain respects, but regarded these improprieties as beyond the reach of the supervisory powers of the federal courts. The magistrate recommended denial of the petition.

Late in the trial the trial judge mused, during a conference to settle instructions, on why he had not opted for extra bailiffs for security as some other judges did. He indicated that he had been concerned not to bring notoriety to a case he felt did not deserve it.

The district court accepted the magistrate's recommendations, pausing only to blame the prosecutor still more strongly for misconduct the district court deemed

"flagrantly provocative" (App. 5); baiting . . . that was "calculated and staged" (App. 5); "shocking . . . disgraceful" (App. 6); " . . . a cheap shot that should have warranted an immediate rebuke from the trial court" (App. 6).

A petition for rehearing and suggestion for rehearing en banc was filed, and denied on June 4, 2002. This petition for certiorari follows in due course. It raises questions of unconstitutionality of the shackling, and ineffective assistance of counsel.

IV.

TRIAL SHACKLING OF THE DEFENDANT WHO BEHAVES PROPERLY IS PROHIBITED UNDER THE CASES, THE CONSTITUTION AND OUR ANGLO-AMERICAN TRADITIONS

A defendant is not to be visibly shackled in jury trial, unless he presents a personal danger of escape or disruption of the proceedings.

For shackling causes jury prejudice, especially where, as here, the allegations are of the commission of violence.

Shackling causes emotional and often, as here, physical pain, and interferes with a defendant's capacity to participate in the defense of his case.

For shackling is a real affront to the dignity of judicial proceeding and of the accused person.

Historical Anglo-American tradition; constitutional provisions; and the cases all bear out and emphasize the wrongfulness of shackling a defendant at trial unless he personally creates the danger to the dignity and security of the court.

V.

FROM MAGNA CHARTA ON, ANGLO-AMERICAN LEGAL TRADITION HAS RIGOROUSLY FORBIDDEN SHACKLING OF A WELL-BEHAVED DEFENDANT AT TRIAL

From the earliest days of Anglo-American legal history, the enduring current runs strongly against physical restraint of the defendant in a jury trial. Only the misconduct or threats of the defendant can justify such restraints, and it is not even contended here that any such misconduct or threats by petitioner motivated his shackling.

Part of this early history of judicial prohibition of physical restraints at trial is well told by Sir Edward Coke in the *Institutes*, (1797), at 34:

> "Bracton saith . . . If felons come in judgment to answer they shall be out of irons and all manner of bonds so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their freewill. And in another place he saith, and of prisoner we will that none shall be put in irons, but those which shall be taken for felony . . . and we defend that otherwise they shall not be punished nor tormented . . . It is an abuse that prisoners be charged with irons, or put to any pain before they be attainted. . . .
>
> To conclude this point, it is against Magna Charta, cap. 29 . . . And accordingly all the said ancient authors are against any pain, or torment to be put or inflicted upon the prisoner before attainder but according to judgement. And there is no one opinion in our books, or judicial record (that we have seen or remember) for the maintenance of tortures or torments."

The principle that a criminal defendant is entitled to be unchained in the courtroom was rigorously followed even in the most extreme cases. Even when defendants charged with the death of King Charles II were to be tried, it was resolved:

> " . . . that when the prisoners come to the bar to be tried, their irons ought to be taken off, so that they be not in torture while they make their case be their crime never so great."[1]

Similarly, Charles Cranburne was tried for treason for conspiring with the French to kill the reigning king William of Orange, and to restore James II. He was brought to the court in irons. The Lord Chief Justice did not wait for the prisoner to seek relief. Instead, *sua sponte*, he directed:

> "Look you, keeper, you should take off the prisoner's chains when they are at the bar, for they should stand at their ease when they are tried."[2]

In an eighteenth century trial for high treason, Christopher Layer was charged with high treason for seeking to depose George I, and replace him with a Pretender. Even in this important trial, the Lord Chief Justice, after previous hesitation, stated peremptorily, "The irons must be taken off; we will not stir till the irons are taken off."[3]

---

[1] *Howell's English State Trials*, 979 (1650-1651).

[2] *Howell's English State Trials*, 222 (1696-1697).

[3] *Howell's English State Trials*, 94, 129 (1722-1725).

Here is yet another example of the strong English tradition against shackling. It is from the work of Hawkins, expounding and enlarging upon Coke and Bracton:

> "First, that every person at the time of his arraignment, ought to be used with all the humanity and gentleness which is consistent with the nature of the thing, and under no other terror or uneasiness than what proceeds from a sense of his guilt, and the misfortune of his present circumstances; and therefore ought not to be brought to the bar in a contumelious manner; as with his hands tied together; or any other mark of ignominy and reproach. Nor even with fetters on his feet, unless there be some danger of a rescous or escape," Hawkins, *Pleas of the Crown*, 436 (6th ed. 1787).

VI.

CONSTITUTIONAL PRINCIPLES ENUNCIATED BY THIS COURT WOULD PROTECT THE PETITIONER, BUT HAVE NOT BEEN EXAMINED AND FOLLOWED BY THE LOWER COURTS IN THIS CASE

This higher American Court, buttressed by the Constitution, follows in the English protective tradition and makes it similarly clear that a defendant in a criminal case is not to appear in the courtroom under physical restraints, or kept from the courtroom, save *in extremis* – as where the defendant presents a threat of attempted escape or of serious disruption of the courtroom.

That case is *Illinois v. Allen*, 397 U.S. 337 (1970). It expresses the court's view that a defendant's appearance under restraints such as shackles places the defendant in

great danger that the jurors would infer that he is a violent person, disposed to commit the type of crime with which he is charged.

Petitioner cited that case over and over with appropriate analysis and discussion, to the district court and to the court of appeals in briefs and memoranda. However, regrettably it does not appear affirmatively that this case was accounted for by either of these courts, or in any way discussed or dealt with in opinions.

The *Allen* Court says at page 344:

> "Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feeling about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold."

The principles set out in *Allen* are vital and should have governed here. It is true that under the circumstances the *Allen* court upheld a temporary removal of a contumacious defendant; and even said that in some situations (which the court did not attempt to foresee) binding and gagging might be a permissible way to handle a defendant. But Allen was a defendant who "argue[d] with the court in a most abusive and disrespectful manner." The dignity and functioning of proceedings may be preserved by strong means if required, but in the present case it was not required.

Defendant in the *Allen* case told the judge that when he went out for lunchtime "you're going to be a corpse here." He threw his attorney's file on the floor. Even after warning, he went on: "There's going to be no trial, either."

After removal, Allen was permitted to return, but said *inter alia*: "There is going to be no proceeding. I'm going to start talking and I'm going to keep talking all throughout the trial. . . . " Removed again, but allowed to return again, he responded to one of the judge's questions with vile and abusive language. No such events occurred or were threatened in the present case.

It was only under such extreme and unusual circumstances that the United States Supreme Court justified the removal (for a time) of Allen and conceded that there could be times when shackling and gagging could be upheld.

Let us compare with the present case. Here the petitioner did not misbehave in the jail, or threaten anyone. He was not warned about misbehavior; he did not need to be warned.

Instead, he was quiet and well-behaved throughout, even under the heavy stress of being shackled and placed in a shameful and dreadful position before the jury. He also suffered pain and a realistic feeling of hopelessness in the jury's contempt and adverse opinion based on the shackling even without any evidence being presented.

As previously indicated, although the trial judge was not favorable toward defendant, and sentenced him as heavily as he could under the law, the court itself conceded and stated, at the time of the sentencing, that the conduct of the defendant had been cordial throughout the trial (RT 3977).

Precisely because visible shackling during a trial is so likely to cause a defendant prejudice, especially in connection with a jury trial, it can be permitted only when

justified by an essential state interest. *Holbrook v. Flynn*, 475 U.S. 569 (1985). There was no such interest here.

As it happens, the only, and non-essential, state interest here appears to be the fact that the superior court found it convenient to conduct the trial in the particular venue and courtroom. There was never shown to be a significant reason why the trial had to be held in its particular Malibu location. There were other courtrooms and venues available within the large Los Angeles County court system and other alternatives to shackling as well.

In the 9th Circuit case of *Duckett v. Godinez*, 667 F.3d 734 (9th Cir. 1995), that court held that the state court had committed constitutional error by requiring petitioner to appear before the sentencing jury in physical restraints. The court of appeal remanded to determine whether the shackling was seen by the jury. Such shackling was held unjustified because there was no "compelling reason" (p. 747), for it, even during a sentencing hearing. As the *Duckett* court said at page 747:

> "In all the cases in which shackling has been approved, there has been evidence of disruptive courtroom behavior, attempts to escape from custody, assaults or attempted assaults while in custody, or a pattern of defiant behavior toward corrections officials and judicial authorities. See, e.g., *Morgan v. Bunnell*, 24 F.3d 49, 51 (9th Cir. 1994); *Hamilton v. Vasquez*, 17 F.3d 1149, 1154-55 (9th Cir. 1994); *United States v. Baker*, 10 F.3d at 1401; *King v. Rowland*, 977 F.2d 1354, 1358 (9th Cir. 1992); *Jones v. Meyer*, 899 F.2d at 885; *Stewart v. Corbin*, 850 F.2d 492, 498 (9th Cir. 1988); *Wilson v. McCarthy*, 770 F.2d at 1485. Here, the record does not indicate any of these factors existed. We conclude, therefore, that the

> State trial court committed Constitutional error by requiring Duckett to appear before a sentencing jury in physical restraints."

Cases like *Wilson v. McCarthy*, 770 F.2d 1482, 1485 (9th Cir. 1985), and *Rhoden v. Rowland*, 172 F.3d 633 (9th Cir. 1999), show only that a brief or inadvertent jury glimpse *outside* the trial rather than during the actual trial, may not cause sufficient prejudice to necessitate the granting of the writ of habeas corpus. See also *Spain v. Rushen*, 883 F.2d 712 (9th Cir. 1989) (serious effects of trial shackling).

As *Rhoden v. Rowland*, 172 F.3d 633 (9th Cir. 1999) shows, visible *trial* shackling in cases where violence is charged is indeed substantially prejudicial. We quote from *Rhoden*:

> "Because at least some of the jurors saw shackles and because the shackles branded Rhoden as having a violent nature in a case where his propensity for violence was the crucial issue, the shackles 'had substantial and injurious effect or influence in determining the jury's verdict' and thus did not constitute harmless error. *Brecht*, 507 U.S. at 637." [The court is here speaking of shackling in trials – not in the hallways, etc.]

All the *Rhoden* requirements showing shackling prejudice, based on time-honored law and common sense are obviously met in the present case –

- In *Rhoden*, "At least some of the jurors saw the shackles." Here, at least two jurors certainly saw the shackles and probably more. And all had to know of the restraints because the court specifically instructed the jurors of their existence.

- In *Rhoden*, the shackles essentially branded him as having a "violent nature." Here, again, the shackles branded petitioner as having a "violent nature."

- In *Rhoden*, defendant's "propensity for violence" was the crucial factor in the charge. Here, too, petitioner would be regarded as having a propensity for violence if he had shot someone with a handgun.

So of course the shackles here too had substantial and injurious effect in determining the jury's verdict; and obviously did not constitute mere harmless error.

In the present case, there exist none of the traditional age-old criteria for judicial acceptance of courtroom shackling as alluded to above. Here was no untoward behavior by petitioner. Petitioner did not make or threaten any "attempts to escape from custody." Petitioner did not engage in "disruptive courtroom behavior." Petitioner did not commit any "assaults or attempted assaults" while in custody.[4] And, petitioner certainly never engaged in a "pattern of defiant behavior toward correctional officials and judicial authorities."

Although the trial judge was not favorable toward petitioner, and sentenced him as severely as he could

---

[4] In the habeas corpus evidentiary hearing the prosecutor did assert that he had hearsay evidence that petitioner told his attorney that he wanted to hit the prosecutor, but this is worthy of very little consideration. In the first place, it was pure hearsay. In the second, it is doubtful from the prosecutor's own testimony that he ever brought it to the attention of the court at all. In the third, even had this private utterance been made, it would not rise to the level of an attempt. In the fourth, this allegedly took place after the shackling decision had been made by the judge and could not have caused it.

under the law, the court itself stated at the time of the sentencing that the conduct of the defendant had been cordial throughout the trial.

The court's own favorable assessment of petitioner's attitude and conduct during the trial was further corroborated by the testimony of the petitioner himself. At the evidentiary hearing, he said that he did not mean to create any disturbance or try to escape, and that he did not tell anyone that he meant to do so (Evidentiary Hearing Transcript, hereinafter "EHT" 104-105).

Despite the contrary view of the lower courts here, it is definitely not a requisite for habeas corpus relief that all jurors be exposed to improper and prejudicial material: This is the standard view of the United States Supreme Court and the Ninth Circuit. Thus, in *Lawson v. Borg*, 60 F.3d 608 (9th Cir. 1995), the court affirmed a judgment granting habeas corpus where, during jury deliberations, one juror committed serious and prejudicial misconduct when he conveyed to other jurors information received out of court about the violent reputation of the defendant. The opinion said:

> "Lastly, our finding of prejudice is not swayed by the state's contention that not all the jury members were exposed to the extrajudicial evidence. The number of jurors affected by the misconduct does not weigh heavily in the prejudice calculus, for even a single juror's improperly influenced vote deprives the defendant of an unprejudiced unanimous verdict. [Citations omitted except] . . . *Parker v. Gladden*, 385 U.S. 363, 366, 87 S.Ct. 468, 471, 17 L.Ed 2d 420 (1966) (A defendant is 'entitled to be tried by 12, not 9 or even 10')."

This Court in such cases as *Parker v. Gladden*, 385 U.S. 363, 366 (1966) has taken the same view as the Ninth Circuit. If there are *any* improperly influenced jurors, that is too many. They need not constitute a majority. Here there is more than one by any accounting, including that of the district court itself.

In *Parker v. Gladden*, on certiorari and in a *per curiam* opinion, this Court reversed a conviction where a bailiff privately and wrongfully expressed his view to the jurors that the defendant was guilty, and that if there was anything wrong in finding the defendant guilty the Supreme Court would reverse it.

It was vainly urged by the state before this Court that no harm could have resulted because 10 members of the jury testified that they had not heard the bailiff's statements. But that contention was not accepted.

Two jurors did hear the improper statements. This Court voided the conviction.

The unauthorized conduct of the bailiff was held in *Gladden* to involve "such a probability that prejudice would result that it is deemed inherently lacking in due process." Cited to this was the case of *Estes v. Texas*, 381 U.S. 532, 543 (1965).

The reviewing court also held that statements of the bailiff to the jury were controlled by the command of the Sixth Amendment, made applicable to the states through the Due Process clause of the Fourteenth Amendment. This, *inter alia*, guarantees that " . . . the accused shall enjoy the right to a trial, by an impartial jury. . . . " And it holds here also.

Similarly, in *Rhoden v. Rowland*, 172 F.3d 633 (9th Cir. 1999), no particular number of jurors had to see the shackles in order to require the writ to be granted. The court climaxed its opinion by saying at Page 637:

> "Because at least some of the jurors saw the shackles and because the shackles essentially branded Rhoden as having a violent nature in a case where his propensity for violence was the crucial issue, the shackles 'had substantial and injurious effect or influence in determining the jury's verdict' and thus did not constitute harmless error. *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed. 353; *Calderon v. Coleman*, ___ U.S. ___, 119 S.Ct. 500, 503, ___ L.Ed.2d ___ (1998); *Castillo*, 997 F.2d at 669; *Duckett*, 67 F.3d at 749."

So saying, the *Rhoden* court immediately reversed the judgment of dismissal and directed the district court to grant habeas corpus. That is what needs to be done here as to those Constitutional violations.

The American Bar Association Standards for Criminal Justice: Discovery and Trial by Jury (Third Edition) provide illuminating standards and are quoted in relevant part:

> Standards 15-3.2: Control, Restraint or Removal of Defendants or Witnesses:
>
> "c) No defendant should be removed from the courtroom, nor should defendants and witnesses be subjected to physical restraint while in court unless the court has found such restraint necessary to maintain order. Removing a defendant from the courtroom or subjecting an individual to physical restraint in the courtroom should be

done *only after all other reasonable steps have been taken to insure order*. In ordering remedial measures, the court must take all reasonable steps to preserve defendants' right to confrontation of witnesses and consultation with counsel." (Emphasis supplied.)

In the course of the commentary on the black-letter standard, it is said:

"Section (c) balances the responsibility of the court to maintain order and decorum in the courtroom with the necessity of protecting the rights of the defendant, particularly the defendant's right to be tried free of restraints and to confront witnesses. It also reflects a moral reluctance to subject a defendant to physical restraints or removal from the courtroom if less severe mechanisms for maintaining order are available and efficacious.

Physical restraints are to be avoided unless necessary because:

(1) the use of physical restraints on the accused may cause the jury to be prejudiced against the accused; (2) the use of such restraints may interfere with the accused's ability to assist in his or her own defense and (3) the use of such restraints is an affront to the dignity of judicial proceedings. In addition, the use of restraints may confuse or embarrass the restrained defendant. In general, the many cases that have addressed the issue hold that, while use of such restraints may be proper under extreme circumstances, their use where unnecessary may violate state or federal constitutional provisions and, in some instances, some statutory law" (footnotes omitted).

The commentary also states:

> "The decision to use restraints or to remove the defendant from the courtroom should be made by the judge, and not by law enforcement officers. The decision should be made only after a hearing, on the record and out of the presence of the jury, and upon a finding that such an extreme remedy is necessary." *Id.*

These are rock-solid principles. All too many were violated in the decisions made in this case by the trial judge, the United States magistrate, the district court, and the Ninth Circuit.

VII.

JURY KNOWLEDGE OF THE PHYSICAL RESTRAINTS ON PETITIONER WAS SUBSTANTIALLY GREATER THAN INDICATED BY THE LOWER COURTS

The Report and Recommendations of the magistrate judge was substantially adopted by the district court and the court of appeals. It indicates, but incorrectly and incompletely, that the total evidence that the jurors saw the shackles at trial was the testimony of the two jurors, Eric Takamine and Barbara Mona. It further indicates that at least five jurors sat through the trial and did not see the shackles at all.

As we show elsewhere, the viewing by two jurors would have in any event been enough to demonstrate the constitutional protections against shackling.

But in reality, the lower courts have inadvertently but substantially understated the extent of jury knowledge

and awareness of the unjustified shackling. This is so even with acceptance of the court's discounting of the testimony of Todd Medved, who testified to considerable observation of the shackles imposed upon petitioner.

For one thing, the lower courts appear to have failed to advert to additional evidence of the jurors' knowledge of the petitioner's unconstitutional shackling.

It is significant that the petitioner himself testified at the evidentiary hearing on the habeas corpus petition that he himself had seen jurors in the front row looking at his shackles. However, the lower courts do not appear to have accounted for this.

* * *

But over and beyond this, there is clear evidence that every juror had significant knowledge of the existence of physical restraints upon the petitioner.

For the jury was actually instructed by the court on its own behalf of the "*fact* that physical restraints have been imposed on defendant Hite." (emphasis supplied.) This was part of the CALJIC Instruction 1.04, given as an integral part of the closing instructions of the court.[5]

---

[5] CALJIC 1.04 as given provided:

"The fact that physical restraints have been imposed on defendant [Hite] must not be considered by you for any purpose. They are not evidence of guilt, and must not be considered by you as any evidence that [he] is more likely to be guilty than innocent. You must not speculate as to why restraints have been imposed. In determining the issues submitted to you, disregard this matter entirely" (Clerk's Transcript, hereinafter "CT" 220).

This instruction, both in its giving and in its formulation, worsens and increases the jury awareness of shackling.

It is true that the instruction urges the jury not to consider the restraints, and to "disregard this matter entirely." But it is incorrect for the lower courts to stress how unaware the jury was of shackles, although the trial court postulated to the jury as a given fact that the petitioner was indeed under physical restraints.

If it had somehow been true that the jury had, up to the time of the giving of instructions, been unaware of the use of shackles, that situation was now drastically altered. The instruction made it certain that every juror knew, reliably and ineluctably, of the physical restraints. The judge had told them of this without equivocation.

The form of this instruction was also very poor. It could readily have been couched in conditional or hypothetical manner, instead of pounding home, flatly and unequivocally, the "fact" of the restraints.

The instruction was of course not the only evidence of the shackling by any means. But it was a regrettable addition to the congeries of matters demonstrating jury awareness of the shackling.

VIII.

AS PART OF A SERIES OF CONSTITUTIONAL MISHAPS, THE TRIAL COURT HELD NO HEARING AT ALL ON SECURITY MEASURES; AND THEN SHACKLED DEFENDANT FOR NO REAL OR VALID REASON

It is clear, and was conceded by the lower courts that, as the Report indicates (App. 35) "shackles were not properly imposed in this case." There was no hearing. There was no threat or improper action by defendant. There was an insecure courtroom wrongly chosen by the court.

As the report indicates (App. 34) " . . . it does not appear from the record that the trial judge seriously considered less restrictive alternatives" [to shackling], such as bailiffs.

Not only did the trial court reach a grossly erroneous result when it decided to shackle the defendant for the whole trial; it reached this wrongful result in a manner which further denied to petitioner the due process to which the Fifth and Fourteenth Amendments entitled him.

To receive fairness and due process in such a situation, plaintiff was entitled to a hearing at which the security questions could be threshed out. *See Holbrook v. Flynn*, 475 U.S. 560 (1986); and *Rhoden v. Rowland*, 172 F.3d 633 (9th Cir. 1999).

There should have been notice of a hearing on these questions. But there was no notice.

There should have been an opportunity to be heard and a hearing. But there was no hearing. The hasty, *sua sponte* decision to shackle him that the judge reached was

ill-considered, and did not afford the opportunity for input on how the matter should be arranged.

Petitioner was denied even the bare rudiments of due process on security questions. Had a hearing actually been conducted, defendant could have pointed out and the trial court could have realized, that extra bailiffs should be used, as they had been by other judges, or that if deemed necessary a more secure venue could have been selected.

Before it imposed shackles, the trial court should have afforded due process of law by conducting a hearing to consider the security risks posed *by the defendant*. His should not have been a *non*-hearing decision based on the physical location of the venue, especially a venue which was, as here, apparently chosen basically for administrative convenience.

Of course there were rational alternatives.

In the first place, the defendant offered no threat of either escape or disruption of the trial. He was fifty years of age. He had no criminal record, either adult or juvenile.

But if the court somehow felt more security was required, there were obvious alternatives. Thus, the case could have been transferred to a more physically secure courtroom in another venue in Los Angeles County.

Or additional bailiffs could have been assigned. The Report quotes the trial judge's statement, very late in the trial, that he could have used extra bailiffs, as some other courts did (Reporter's Transcript, hereinafter "RT" 3075) (App. 21-22). The Report concludes that the judge's mind was made up to impose shackles regardless of the availability of other alternatives. Neither the district judge nor the court of appeals said otherwise.

* * *

The Report urges (App. 23) that the burden of demonstrating prejudice for an asserted constitutional violation rests with the petitioner. If that be so, petitioner clearly meets and sustains the burden.

For he does show that he was indeed shackled; and shackled during trial; and that jury members saw and knew of the shackling; and that the charge against him (first-degree murder) is a charge involving violence.

Has prejudice been demonstrated with certainty, beyond any doubt whatever? No; but that is not the standard of the cases or of logic. We are not dealing with mathematical equations nor chemical formulas capable of determination with absolute precision. Instead, we are in the realm of the social sciences, where we must deal with probabilities, of strong tendencies of human feelings and expectations. And within this realm it can readily be said that there is obvious and strong likelihood of prejudice. The jurors themselves may not be able to recall exactly what ran through their minds during the trial that took place seven or eight years before. But the probability that such matters as shackling did affect them, during the evidence presentation or in the jury room during deliberations, can be clearly evaluated as being extremely high.

IX.

INEFFECTIVE ASSISTANCE OF DEFENSE TRIAL COUNSEL AND WEAK EVIDENCE SHOW CAUSE AND PREJUDICE, OVERCOMING PROCEDURAL DEFAULTS

Under the constitutional right to counsel in criminal cases and pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, a defendant in a criminal case is entitled to counsel to represent him. That means reasonably effective counsel to assist the defendant.

The Report of the magistrate judge, substantially adopted by the district court and court of appeals, conceded and indeed stated flatly that defense counsel rendered deficient performance. The Report said that reasonably effective counsel would seek to protect their client by objecting. The Report found that defense trial counsel (hereinafter "DTC") did not object (App. 22) and that there was no valid tactical reason for so failing. Thus the Report found defective performance of DTC. However, it then concluded that the evidence of guilt was so strong that since many jurors had not seen the shackling, there was not prejudice to defendant to overcome the failure to object. But in point of fact the evidence was far from strong.

Any possible effort by respondent to constitutionally justify the shackling by looking at the evidence later and simply asseverating the strength of the case, aside from a backward lack of logic, fails for a simple but powerful reason: The evidence in this case was tissue-thin. There was no real identification – only that of a figure (not a face) in the dark which looked like defendant's body. The only connection of petitioner to the stray gun, found later

in the street, was doubtfully made by a woman who was not sure and also knew little about guns. There were no fingerprints, no DNA evidence, and no positive results of any gunpowder residue tests on the defendant. There was another suspect on the scene – drunken, self-admittedly mendacious – who fired his own gun wildly at the time of the murder. These are a few of the great irreparable evidentiary flaws.

And when we add this inherent evidentiary weakness into other trial errors, the effect of the intensely prejudicial shackling is magnified. Thus, the conceded prosecutorial conduct, whether or not itself of constitutional dimensions, shows other flaws which make the shackling loom even larger.

Strickland v. Washington, 466 U.S. 668, 688-693 (1984) established the two requirements that defendants are to meet to prevail on a claim of ineffective assistance of counsel: (1) it must be shown that counsel's performance fell outside the wide range of professional competence; and (2) it must be shown that counsel's conduct was prejudicial to defendant's case, that is, that "there is a reasonable probability that, but for counsel's professional errors, the result in the proceeding would have been different."

In the *Strickland* case, this court emphasizes the need for counsel in a criminal trial:

> "In a long line of cases . . . this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right of a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of

> the Sixth Amendment, including the Counsel Clause." (Citations omitted.)

On the vital question of shackling, DTC failed in virtually every way to put forth any effort on behalf of petitioner. The failure was not based on and had little or nothing to do with sound tactical decisions. He also failed to advise petitioner as to what could be done.

DTC knew it was probable, if not indeed almost certain, that jurors in this long trial would see the shackles; and, of course, that this could and would for all practical purposes reverse the presumption of innocence to which petitioner, like other defendants, was entitled. Yet DTC did nothing to prevent the shackling.

Contrary to the teaching of relevant cases, as to the shackling DTC did not play the role of an attorney, protecting the defendant and assuring fairness.

DTC's conduct completely failed to fulfill the role taught in *Strickland v. Washington*, *supra*, which says at page 692:

> "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."

But here DTC played no such role.

After some discussion by the judge, petitioner said, politely but strongly, "Your Honor, I've been in eight months and haven't gotten into any kind of trouble." (RT 5) Thus, petitioner made the only effort to avoid shackling.

But what was the contribution of petitioner's defense attorney? Exactly nothing. He remained mute throughout while the court fixed, in open court, on the shackling of petitioner, without a hearing.

As DTC testified at the evidentiary hearing, he simply wasn't going to push the issue with the court. Asked for his assessment of the court's view that petitioner would wear leg shackles, DTC said, "He's the judge. He's in charge. . . . I was trying the case in front of the judge and I wasn't going to push it any further. That's the bottom line." (EHT 167)

In other words, he was not going to make any efforts to avoid or protest the shackling; and he did not.

The duty to bring professional skill and knowledge to the issue of shackling was not fulfilled.

Indeed, the DTC never, on the trial record, complained or objected at any time in any way to the shackling of petitioner. This shows on the record and was testified to by DTC himself. (EHT 171)

In *Crotts v. Smith*, 73 F.3d 861 (9th Cir. 1996), the Ninth Circuit affirmed the district court's granting of petitioner's writ of habeas corpus. This was basically for ineffective assistance of counsel. Defense counsel failed to object to the prosecution questioning of two witnesses on a supposed "killing of a cop" statement of a defendant charged with assaulting a police officer with a deadly weapon. It was held that counsel's performance on this

single aspect of the trial fell outside the wide range of professional competence, and constituted ineffective assistance of counsel.

Further, the *Crotts* court applied the *Strickland* standard that the failure of counsel could have affected the outcome of the case, and so sustained the granting of the writ.

In the present case there also was, at the very least, a strong probability that, had not the counsel committed unprofessional errors as to the shackling and the prosecutorial misconduct, the result of the proceeding would have been different.

Neither in *Crotts* nor in the present case is it possible or necessary to prove absolutely that a different result would have obtained had counsel followed a correct approach. In both cases, and generally, it is only necessary to prove the outcome could reasonably have been different if a correct course had been followed. See *Strickland v. Washington*, 466 U.S. 684.

The *Strickland* rule that while there has to be a likelihood of an altered result, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case." *Id.* at 693.

CONCLUSION

Petitioner was damagingly shackled and prejudiced, for no valid reason, and through no fault of his own. The jury trial and due process violations are clear and crucial.

The evidence was thin and the courts have conceded and stated the clear failure of petitioner's trial lawyer to function effectively. Thus the Constitutional right to assistance of counsel was violated.

The petition for certiorari should be granted, the judgment of conviction reversed, and the writ of habeas corpus granted.

Respectfully submitted,

LARRY STEINBERG
Counsel of Record
ANITA STEINBERG
ROBERT I. STEINBERG
Counsel for Petitioner
William J. Hite

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM J. HITE, Petitioner-Appellant, v. GARY LINDSEY, Warden; DANIEL E. LUNGREN, CA State Attorney General, Respondents-Appellees.	No. 01-55071 D.C. No. CV-97-08222-AHM MEMORANDUM* (Filed Mar. 19, 2002)

Appeal from the United States District Court
for the Central District of California
A. Howard Matz, District Judge, Presiding

Argued and Submitted March 13, 2002
Pasadena, California

Before: KOZINSKI and GOULD, Circuit Judges, and BREYER,** District Judge.

California state prisoner William J. Hite appeals the district court's order denying his 28 U.S.C. § 2254 petition for writ of habeas corpus. Hite makes claims regarding his shackling during the trial, prosecutorial misconduct and ineffective assistance of counsel. We affirm for the reasons

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** The Honorable Charles R. Breyer, United States District Judge for the Northern District of California, sitting by designation.

stated by the district court and magistrate judge in their thorough and reasoned dispositions.

In his Opening Brief, Hite also challenged the admission of certain testimony by his ex-wife, Rebecca Allen, concerning his physical and emotional abuse of her during their marriage. Hite did not receive a Certificate of Appealability on this issue and therefore this claim is not properly before us.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WILLIAM J. HITE, Petitioner, v. GARY LINDSEY, Warden, et al., Respondents.	CASE NO. CV97-8222 AHM (RZ) ORDER ACCEPTING AND MODIFYING FINDINGS AND CONCLUSIONS OF UNITED STATES MAGISTRATE JUDGE (Filed Dec. 11, 2000)

The Court concurs in and adopts the Magistrate Judge's well-reasoned analysis and his sound conclusions in the Report and Recommendations ("the Report"). However, the Court is compelled to supplement the discussion of the prosecutor's misconduct, and to that extent alone modifies the findings and conclusions of the Magistrate Judge.

In a decision issued following the submission of the Report, the Court of Appeals for the Ninth Circuit upheld the District Court's denial of a habeas petition under 28 U.S.C. § 2254. *Drayden v. White*, ___ F.3d ___, 2000 WL 1693248 (9th Cir., November 14, 2000). The petitioner had raised several arguments, one of which was that the prosecutor had engaged in misconduct during his closing argument. The misconduct consisted of the prosecutor taking it upon himself to sit in the witness chair and speak as if he were the murdered victim. His soliloquy depicted the victim as extremely sympathetic and the defendant as cold-blooded. As the Court of Appeals noted,

> "By doing so, the Prosecutor inappropriately obscured the fact that his role is to vindicate the public's interest in punishing crime, not to exact revenge on behalf of an individual victim . . . [B]y testifying as [the victim], the Prosecutor also risked improperly inflaming the passions of the jury . . . " *Id.* at *6

The Petitioner asked the Court of Appeals to adopt a *per se* rule that this kind of misconduct violates a defendant's due process rights and always requires reversal. The Ninth Circuit declined to do so. The Court cited the normal standard for review of prosecutorial misconduct in federal habeas cases – the same standard that the Magistrate Judge properly applied in this case. It noted that the standard is "the narrow one of due process, and not the broad exercise of supervisory power. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868 . . . (1974)." *Id.* Moreover, the Ninth Circuit noted, the trial court had instructed the jury that it should return a verdict based only on the evidence and that statements made by the attorneys during a trial are not evidence, and it said "We presume the jury followed the instructions." *Id.* That same presumption applies here. Although the Court of Appeals characterized the Prosecutor's soliloquy as "deplorable," it found that it did not infect the trial with unfairness such that petitioner suffered a violation of his due process rights.

The Report and *Drayden* both confirm that a defendant seeking federal habeas relief because of a prosecutor's inflammatory remarks faces an extremely high standard. This Court might not have developed such a high standard, but it is bound to follow it. Moreover, the misconduct here occurred only at a few intervals in a

lengthy trial (seven weeks), a trial that involved very gripping testimony about tangled relationships, jealousies and passions. In a lengthy trial such inflammatory statements are likely to have a lesser impact than in a much shorter trial. Nevertheless, if the Court could exercise its own supervisory authority to assure that lawyers comply with ethical and professional standards, it would sanction Mr. Richman, because his prosecutorial abuses are unacceptable.

While all of the examples listed at pages 23-24 of the Report reflect inappropriate behavior, not all of the examples of misconduct are equally reprehensible. Those that require additional commentary are as follows.

1. *"Do you want to take a piece of me Mr. Hite? Do you want to take a swing at me?"* Hite answered simply "No" to this mocking challenge. This Court would not characterize such flagrantly provocative behavior in front of a jury merely as "unprofessional." It was wrong. At the hearing before the Magistrate Judge on this petition, Mr. Richman admitted that during the trial, but outside the presence of the jury, his investigating officer had overheard Mr. Hite indicate to his lawyer that he would like to strike Mr. Richman. Mr. Richman then testified before the Magistrate Judge as follows:

> "And being aware of Mr. Hite's desire to do violence to me, I actually attempted to elicit Mr. Hite to make that same threat in front of the jury at a later point in time, and he did actually indicate that he wished to strike me during the course of testimony later in front of the jury."

This establishes that Mr. Richman's baiting of the petitioner was calculated and staged. Moreover, the transcript

reflects that a few lines later the trial judge told Mr. Richman to back away from the witness. Having coolly set out to engage in a bitterly personal confrontation, Mr. Richman cannot even claim that he was provoked or that his misconduct was invited.

2. *"You haven't killed anybody, yet."* Mr. Richman turned around and spoke these shocking words to a civilian spectator in the audience, the son of petitioner. The Magistrate Judge characterized this as a "sarcastic aside." It was more than that; it was disgraceful. But the record does not reflect that Mr. Richman resorted to theatricality in displaying his obvious enmity toward all members of petitioner's family, and petitioner has not alleged that he did. Since there is no evidence that when the prosecutor addressed petitioner's son he paused, or he smiled mockingly or flashed some kind of knowing sign to members of the jury or otherwise revealed that this supposed slip of tongue was actually planned, it is less likely that this statement had an impact on the jurors. Indeed, given that this statement was directed not at petitioner but at his son; that it did not comment improperly on evidence that was received; and that it was an exceedingly fleeting remark, the Court finds that it could not have had such a prejudicial impact on the jury to affect petitioner's constitutional rights. Nevertheless, it was a cheap shot that should have warranted an immediate rebuke from the trial court.

3. *"[His defense counsel's] interest is to get his client off no matter if he is guilty or not."*

It was totally inappropriate for Mr. Richman to vouch for his own credibility, as the Report notes. To some extent, however, the transcript suggests that defense

counsel invited this statement by arguing, in essence, that the prosecution was not out to achieve justice but to convict no matter what. In *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 2472, the Supreme Court noted:

> "Much of the objectionable content was invited by or was responsive to the opening summation of the defense. As we explained in *United States v. Young*, 470 U.S. 1, 105 S.Ct. 1038 (1985), the idea of 'invited response' is used not to excuse improper comments, but to determine their effect on the trial as a whole."

That principle is applicable here, and for the reasons set forth in the Report the trial as a whole did not result in a deprivation of petitioner's due process rights.

With these modifications, the Court accepts the Magistrate Judge's Report, and concurs in his recommendations.

Dated: December 8, 2000

/s/ A. Howard Matz
A. Howard Matz
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WILLIAM J. HITE, Petitioner, vs. GARY LINDSEY, Warden, Respondent.	CASE NO. CV 97-8222 AHM (RZ) JUDGMENT (Filed Dec. 11, 2000)

This matter came before the Court on the Petition of WILLIAM J. HITE for a writ of habeas corpus. Having reviewed the Petition and supporting papers, and having accepted the Report and Recommendation of the United States Magistrate Judge,

IT IS ORDERED AND ADJUDGED that the Amended Petition is denied and the action is dismissed with prejudice.

DATED: December 8, 2000

/s/ A. Howard Matz
A. HOWARD MATZ
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WILLIAM J. HITE, Petitioner, vs. GARY LINDSEY, Warden, Respondent.	Case No. CV 97-8222 AHM (RZ) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (Filed Jul. 20, 2000)

Pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California, the undersigned submits this Report and Recommendation to the Honorable A. Howard Matz, United States District Judge. The undersigned recommends that the Amended Petition for Writ of Habeas Corpus be denied and that this action be dismissed with prejudice.

BACKGROUND

On July 14, 1993, the petitioner, William Hite, was convicted in Los Angeles County Superior Court of first degree murder, a violation of California Penal Code § 187(a). That conviction arose from the killing of Edward Kislo, an off-duty detective with the Los Angeles Police Department. Kislo was shot to death in the backyard of Fredrica Haymaker, the petitioner's estranged girlfriend.

According to testimony given at trial, on the evening of August 22, 1992, at around 11 30 p.m., Haymaker heard a noise in her backyard and, upon looking outside, saw a

prowler. (Reporter's Transcript ("R.T.") at 2096-98) Haymaker telephoned Kislo, a neighbor, for help. (R.T. at 2110.) Within a few minutes, Kislo arrived at Haymaker's house with a handgun and went out into the backyard. (R.T. at 558, 2113-14.) Told that the prowler was hiding in some bushes in a particular part of the yard, Kislo approached the bushes, announced himself as a police officer, and ordered the prowler to come out. (R.T. at 560-61.) Immediately after that, a shot was fired from out of the bushes (R.T. at 574.) Kislo was hit in the neck and was pronounced dead later that night. (R.T. at 970, 979-80.) The prowler in the bushes could not be positively identified by witnesses, however, various pieces of circumstantial evidence led authorities to believe that the petitioner was the gunman.

The trial took place from May 26 to July 14, 1993, at the Malibu Municipal Court before the Honorable Lawrence Mira. At the beginning of the proceedings, Judge Mira ordered that the petitioner be shackled (R.T. at 5-6), and the petitioner in fact wore leg shackles throughout most of the trial. The petitioner testified in his own defense, contending that he was not the shooter and that he was elsewhere when the crime was committed. (R.T. at 2746-50.) The jury found the petitioner guilty, and he was sentenced to a term of 30 years to life in state prison.

The petitioner appealed his conviction to the California Court of Appeal, filing his Opening Brief on February 17, 1995. On May 23, 1996, the petitioner filed with the Court of Appeal a habeas petition. The Court of Appeal ordered that disposition of the habeas petition be deferred and that the petition be considered concurrently with the direct appeal. On July 2, 1996, both the appeal and the habeas petition were denied. The petitioner sought review

from the California Supreme Court, filing both a petition for review and a habeas petition on August 9, 1996. The state high court denied both applications on October 16, 1996.

The petitioner initiated the present action on October 15, 1997, by filing with the court a Petition for Writ of Habeas Corpus by a Person in State Custody, pursuant to 28 U.S.C. § 2254. The petitioner raises four grounds for relief. First, he argues that the trial judge erred when he ordered that the petitioner be shackled. Second, he claims that the prosecutor engaged in misconduct at trial. Third, he contends that he received ineffective assistance of trial counsel. Finally, the petitioner maintains that he was unfairly prejudiced by the admission of testimony regarding prior bad conduct.

In a Report and Recommendation filed August 13, 1999, the undersigned found that several instances of prosecutorial misconduct and ineffective assistance of counsel alleged by the petitioner were not exhausted and that, therefore, this action was subject to dismissal. In response, the petitioner filed an Amended Petition on September 3, 1999, deleting the unexhausted portions of the original Petition. On December 14, 1999, the Court held an evidentiary hearing to develop the facts relating to the shackling of the petitioner during the state trial. The parties now have filed post-hearing briefing, and the Amended Petition stands submitted.

ANALYSIS

A. Standard of Review

The federal habeas statute prescribes the degree of deference that must be accorded in federal habeas proceedings to state court decisions which previously addressed pending habeas claims providing as follows.

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d).

A state court decision is "contrary to" clearly established federal law if the state court applies a rule that contradicts the governing law set forth by the Supreme Court or if the state court confronts a set of facts that are materially indistinguishable from those in a decision of the Supreme Court and nevertheless arrives at a different result. *Williams v. Taylor*, 120 S.Ct. 1495, 1519-20 (2000). A state court decision involves an "unreasonable application of" clearly established federal law if the state court identifies the correct governing legal principle from the

decisions of the Supreme Court but unreasonably applies that principle to the facts of the case. *Id.* at 1520.

However, to find an unreasonable application of Supreme Court precedent, a federal habeas court may not conclude merely that the petitioner has the better of two reasonable legal arguments. *Van Tran v. Lindsey*, 212 F.3d 1143, 1153-54 (9th Cir. 2000). Rather, the reviewing court must find that "clear error" occurred. *Id.* That is, the court must be left with a firm conviction that one answer, the one rejected by the state court, was correct and the other, the application of federal law that the state court adopted, was erroneous. *Id.*

Under the terms of the statute, the key to triggering this standard of review is a previous "adjudicat[ion] on the merits in State court proceedings." Therefore, this Court must apply §2254(d)'s deferential standard of review to the extent the petitioner's claims were addressed and disposed of on their merits by the California state courts.

B. Ground One: Shackling

In Ground One of the Amended Petition, the petitioner argues that Judge Mira's decision to have the petitioner shackled throughout the trial violated the petitioner's constitutional rights. Generally, a criminal defendant has a constitutional right to appear before a jury free of shackles. *Spain v. Rushen*, 883 F.2d 712, 716 (9th Cir. 1989). The petitioner argues that, in his case, there was no justification to have him shackled and the shackling itself substantially prejudiced him in the eyes of the jury. (Amended Petition at 24-30).

1. Exhaustion

In opposition to the petitioner's shackling claim, the respondent argues first that the claim is unexhausted. As a matter of comity between state and federal courts, a federal court should not address the merits of a habeas corpus petition unless the petitioner first has sought state judicial review of every ground presented in the petition. *Rose v. Lundy*, 455 U.S. 509, 518-22 (1982). Indeed, Congress has instructed that a habeas petition brought by a person in state custody cannot be *granted* "unless it appears that – (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process, or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1). To exhaust state remedies, a petitioner must fairly present his contentions to the state courts, and the highest court of the state must dispose of them on the merits. *O'Sullian v. Boerckel*, 526 U.S. 838, 843-47 (1999). In the state proceeding, the petitioner must describe *both* the operative facts and the federal legal theory underlying his claim. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995).

Here, the respondent points out that, in presenting his shackling claim to this Court, the petitioner attached to the Amended Petition the declaration of two jurors from his state trial, who aver that they saw the petitioner's shackles during trial. (*See* Amended Petition, Exs. 4 & 5.) These declarations were not presented to the state courts when the petitioner raised his shackling claim on direct appeal and in his state habeas petitions. (*See, e.g.*, Petition for Review to California Supreme Court, Answer Ex. D, Petition for Writ of Habeas Corpus to California Supreme Court, Answer Ex. E.) According to the respondent, this

failure means the petitioner did not present the operative facts of his claim to the state courts and his claim is, therefore, unexhausted. (Answer at 37-38, Respondent's Memorandum Re Further Proceedings at 3-4, Respondent's Post-Evidentiary Hearing Brief at 3.) This argument fails. The Supreme Court established in *Vasquez v. Hillery*, 474 U.S. 254, 258-59 (1986), the new evidence in the form of declarations and affidavits supporting an otherwise exhausted claim does not render that claim unexhausted for federal habeas purposes.

The respondent contends that *Vasquez* is distinguishable because in that case the Supreme Court cautioned in dicta that newly obtained declarations and affidavits could not be presented on federal habeas if such evidence was withheld deliberately from the state courts. *See* 474 U.S. at 260. (Memorandum Re Further Proceedings at 5; Post-Evidentiary Hearing Brief at 4-5) However, there is no basis to conclude that the petitioner's failure to present juror declarations to the state courts was a deliberate attempt to circumvent state review, as the respondent asserts. On the contrary, the petitioner specifically informed the California Supreme Court that jurors had seen him shackled, and he requested an evidentiary hearing to develop further the facts regarding what jurors witnessed. (*See* Petition for Writ of Habeas Corpus to California Supreme Court at 4, 12.)

The respondent further contends that the petitioner's current allegation that jurors saw his shackles during trial proceedings renders his present claim a fundamentally different one from the claim presented to the state courts. (Memorandum Re Further Proceedings at 4-5; Post-Evidentiary Hearing Brief at 3-5.) This argument also fails. As noted above, the petitioner specifically informed

the California Supreme Court that jurors had seen him shackled. (Petition for Writ of Habeas Corpus to California Supreme Court at 12.) Furthermore, the petitioner argued, relying on both United States Supreme Court and Ninth Circuit case law, that his appearance before the jury in shackles likely led the jurors to infer that he was violent and/or disposed to commit the crime of which he was accused – namely, murder. (Petition for Writ of Habeas Corpus to California Supreme Court at 6.)

Thus, it was clear in his state court pleadings that the petitioner was complaining about the prejudice he suffered as a result of being shackled in the presence of the jury – the same claim that he raises before this Court. The petitioner previously has presented to the California Supreme Court both the operative facts and the federal legal theory underlying his claim. Therefore, the respondent's exhaustion argument fails.

2. Procedural Default

As an alternative procedural defense, the respondent argues that, even assuming the petitioner's shackling claim is not unexhausted, it is procedurally defaulted. (Answer at 35-37.) This argument is more persuasive.

Under the doctrine of procedural default, when a state court denies a challenge to a criminal conviction for failure to comply with a state procedural rule, a federal court is precluded from reviewing the claim in the context of a subsequent federal habeas proceeding. *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991). In order for procedural default to apply, the state court's denial of the claim must rest on a state law ground that is independent of the federal question and adequate to support the judgment.

Coleman v. Thompson, 501 U.S. 722, 729 (1991). For a state law ground to be "independent," it must not be interwoven with federal law. *La Crosse v. Kernan*, 211 F.3d 468, 471 (9th Cir. 2000). For a state law ground to be "adequate," it must be strictly or regularly followed and consistently applied. *Id.*

In order to determine whether a procedural default has occurred, this Court must examine the basis of the relevant state court judgment. *Wells v. Maass*, 28 F.3d 1005, 1008 (9th Cir. 1994). In this case, the petitioner raised his shackling claim to the California Supreme Court in the context of both a petition for direct appellate review and a state habeas petition (*See* Petition for Review to California Supreme Court at 7-9, Petition for Writ of Habeas Corpus to California Supreme Court at 6-8) in both instances, the state high court denied the petition in its entirety without discussion or citation. (*See* Respondent's Exs. D & E.) However, where there has been one reasoned state court judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim are presumed to rest upon the same ground. *Ylst*, 501 U.S. at 803. Here, the Court must apply this presumption and "look through" the California Supreme court's silent denials to the only prior adjudication of the petitioner's shackling claim – the opinion of the California Court of Appeal on direct review.

In its Opinion denying the petitioner's appeal, the Court of Appeal ruled that the petitioner's shackling claim had been waived because he had not objected to the shackles at the time they were imposed by the trial judge. (Opinion, Respondent's Ex. C, at 5.) The court noted that it is the settled rule in California that the use of physical

restraints in the trial court cannot be challenged for the first time on appeal. (*Id.*) Rather, the defendant is required to make an objection at the time shackles are imposed and make a record at the trial court level. (*Id.*) Since the petitioner failed to do so in this case, the court deemed the shackling claim waived and declined to address it on its merits. (*Id.*)

The Court of Appeal's ruling that the petitioner had not objected to the shackling was a finding of fact by the state court which is presumed to be correct unless the petitioner rebuts that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). In this case, the petitioner has presented evidence in an attempt to show that an objection to the shackling in fact was made. The petitioner does not contest that no objection was registered on the record. However, at the evidentiary hearing, the petitioner elicited testimony from his trial counsel, Richard Knickerbocker, that Knickerbocker objected to the shackling in an in-chambers, off-the-record conference with Judge Mira prior to the start of trial.

This evidence was not clear and convincing. To begin, with, Knickerbocker's testimony was contradicted by that of the prosecuting attorney, Craig Richman. Richman testified that Knickerbocker made no objection to the shackling during the off-the-record, pre-trial, conference with Judge Mira (Evidentiary Hearing Transcript ("E.H.T.") at 148, 153.) Furthermore, Knickerbocker's own testimony at the hearing was equivocal. When first questioned about whether he objected to the fact that his client was shackled, he indicated that he did not so object:

Q Do you recall, when the judge indicated that Mr. Hite would wear leg shackles, whether or not you made any objection?

A I recall making an objection with regard to the shackles in terms of wanting them to be totally unobtrusive and also want them not to harm Mr. Hite. Mr. Hite, I think, had indicated to me that either his hands or his legs were too tight and that they were bothering him. And I did bring that up to the judge, and the judge, I think, had the sheriff look and see to what degree the shackles were bothering him.

Q So any objection would have gone to the degree of shackling that was imposed?

A: I think that's accurate.

Q Is it fair to say that you didn't object to the shackling in toto?

A: The answer to that question is yes. If you want an explanation, I'll explain it.

(E.H.T. at 165-66.) At that point, the Court stepped in to clarify whether Knickerbocker in fact had objected to the shackles:

The Court: Wait just a moment. I want to make sure I understand the question. The question was, is it fair to say that you didn't object? So your answer, yes, it's fair to say. Did you object to the existence of shackling?

The Witness The answer to that question is yes

> The Court You did object to the existence of shackling?
>
> The Witness Yes.

(E H.T. at 166) Therefore, Knickerbocker's testimony at the evidentiary hearing as to whether he objected to the very fact that the petitioner was shackled was, in effect, both "no" and "yes." This hardly amounts to the clear and convincing evidence that is required to rebut the Court of Appeal's factual finding. Indeed, the Court would expect that any attorney making such an objection would take pains to make the objection plain, including making it part of the record after the off-the-record conference. Given that absence of record evidence, the finding of the Court of Appeal, and the equivocal testimony at the evidentiary hearing, the Court finds that the petitioner raised no objection at trial to the court's order that he be shackled.

The petitioner's shackling claim was denied by the state courts based on the petitioner's failure to comply with a state procedural rule – that the claim first must be raised through an objection made in the trial court at the time the shackling is imposed. This rule is "independent" in that it is not interwoven with federal law. Furthermore, the rule is "adequate" because it is regularly followed and consistently applied by the state courts. *See, e.g., People v. Tuilaepa*, 4 Cal. 4th 569, 583, 15 Cal. Rptr. 2d 382, 390 (1992); *People v. Stankewitz*, 51 Cal. 3d 72, 95, 270 Cal. Rptr. 817, 832 (1990); *People v. Walker*, 47 Cal. 3d 605, 629, 253 Cal. Rptr. 863, 876 (1988); *People v. Jacobs*, 210 Cal. App. 3d 1135, 1143, 258 Cal. Rptr. 734, 739 (1989); *People v. Thompkins*, 195 Cal. App. 3d 244, 254, 240 Cal. Rptr. 516, 522 (1987). Indeed a state's "contemporaneous objection" rule has been recognized consistently by the

federal courts as the basis for a procedural default. *See Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977); *Bonin v. Calderon*, 59 F.3d 815, 842-43 (9th Cir. 1995); *Hines v. Enomoto*, 658 F.2d 667, 673 (9th Cir. 1981). Therefore, the petitioner's shackling claim has been procedurally defaulted.

Finding that the shackling claim has been procedurally defaulted does not end the inquiry, however. A petitioner can obtain federal review of a procedurally defaulted claim if he can show either (1) "cause and prejudice" or (2) a "fundamental miscarriage of justice" *Coleman*, 501 U.S. at 750. "Cause" is a legitimate excuse for the default. *Magby v. Wawrzaszek*, 741 F.2d 240, 244 (9th Cir. 1984). "Prejudice" is actual harm resulting from the alleged constitutional violation *Id.* A "miscarriage of justice" occurs only in the extraordinary instance when a constitutional violation probably has caused the conviction of one innocent of the crime. *McCleskey v. Zant*, 499 U.S. 467, 494 (1991).

It is clear that the petitioner cannot show a fundamental miscarriage of justice. To establish a miscarriage of justice, a petitioner must make a colorable showing of actual innocence. *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992). The petitioner has made no such showing here. Therefore, if the petitioner is to overcome the procedural default and obtain review of his shackling claim on its merits, he must do so by means of establishing cause and prejudice.

To establish cause for his default, the petitioner argues that his trial attorney's failure to object to the shackling amounted to constitutionally defective assistance of counsel. (Petitioner's Traverse at 11-12.) Trial counsel's

failure to preserve a claim for review in state court will suffice for "cause" where the failure is so serious a lapse as to amount to ineffective assistance of counsel in violation of the Sixth Amendment. *Edwards v. Carpenter*, 120 S.Ct. 1587, 1591 (2000). A claim of ineffective assistance of counsel has two components: (1) the petitioner must show that counsel's performance was deficient, and (2) the petitioner must show that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To establish deficient performance, the petitioner must show that the attorney made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* The proper standard for evaluating attorney performance is that of reasonably effective assistance. *Id.* That is, the petitioner must show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. The purpose of the inquiry is to ensure that the petitioner received the zealous, competent representation to which he was entitled. *Chacon v Wood*, 36 F.3d 1459, 1464 (9th Cir 1994)

In this case, defense counsel rendered deficient performance. A criminal defendant ordinarily has the right to appear before a jury unshackled. Reasonably effective counsel would seek to enforce this right by objecting to a trial court's order that his client be shackled. It is true that ineffective assistance is not established merely by criticizing the attorney's trial tactics or by second-guessing an attorney's strategic decision when such decision was reasonable under the circumstances. *United States v. Ferreira-Alameda*, 815 F.2d 1251, 1254 (9th Cir. 1986), *United States v. Chambers*, 918 F.2d 1455,

1461 (9th Cir. 1990). However, there is no legitimate tactical reason for not objecting to the shackling of one's client, particularly where, as here, such failure to object will lead to forfeiture of the right to challenge the shackling on appeal. Trial counsel's failure was not objectively reasonable and did not amount to zealous, competent representation.

However, in order to establish ineffective assistance of counsel, the petitioner must show both deficient performance *and* prejudice. When a petitioner relies on ineffective assistance of counsel to establish cause for a procedural default, the "prejudice" prong of the ineffective-assistance test merges with the "prejudice" prong of the cause-and-prejudice test. *See White v. Lewis*, 874 F.2d 599, 603-04 (9th Cir. 1989) (applying same analysis to both types of prejudice). Therefore, whether the petitioner can establish both cause and prejudice in order to overcome the procedural default in this case turns on whether he can show that he was prejudiced as a result of being shackled in front of the jury.

The burden of demonstrating prejudice rests with the petitioner. *Correll v. Stewart*, 137 F.3d 1404, 1415 (9th Cir. 1998). To meet this burden, he must establish not merely that the alleged constitutional violation presented a possibility of prejudice, but that the violation resulted in actual and substantial prejudice, infecting his entire trial with error of constitutional dimensions. *Id.* In the shackling context, "[t]he degree of prejudice is a function of the extent of chains applied and their visibility to the jury. In other words, the greater the intensity of shackling and the chains' visibility to the jurors, the greater the extent of prejudice" *Spain*, 883 F.2d at 722. Thus, prejudice will be

presumed when a defendant is subjected to maximum restraints (leg irons, handcuffs, a waist chain, chains that hold him to the chair, etc.) and when the shackles are conspicuous, allowing the jury to appreciate the full extent of the chaining. *Id.* However, prejudice does not necessarily result when the defendant is subjected to minimal shackling and the jury's view of the defendant in shackles is brief or inadvertent. *Wilson v. McCarthy*, 770 F.2d 1482, 1485-86 (9th Cir. 1985). In such cases, the petitioner must make an affirmative showing of actual prejudice. *Id.*

At the evidentiary hearing, the Court heard testimony from eight different witnesses who had served on the jury in the petitioner's state court trial: Todd Medwed, Eric Takamine, Barbara Mona, Peter Dube, Neil Brown, Sharon Flummerfelt, William Bass, and Patricia Hank. Five of these witnesses – Dube, Brown, Flummerfelt, Bass and Hank – testified either they did not see or did not recall seeing the petitioner in any kind of restraints during the trial. (E.H.T. at 53, 61-62, 67, 70, 73, 78.)

The other three jurors testified that they did see the petitioner wearing shackles during the course of the trial. Todd Medwed testified that on a number of occasions during the seven week trial, the jurors were seated in the courtroom before the petitioner was brought in. (E.H.T. at 21, 23-24.) On these occasions, Medwed testified, the petitioner was brought into the courtroom wearing both handcuffs and leg shackles and would have to walk past the jury box, in full view of the jury, in order to get to his seat at the defense counsel's table. (E.H.T. at 21, 25-26, 33.) Once he reached his seat, the handcuffs would be taken off but the leg shackles would be left on. (E.H.T. at 21, 33.) Medwed testified that he was able to observe the

leg shackles continuously throughout the proceedings. (E.H.T. at 21-22, 27.)

Eric Takamine also testified that he observed the petitioner wearing leg shackles (E.H T at 34.) He could not recall how many times he saw the shackles, although he testified that it was "more than once" and that it occurred "occasionally." (E.H.T. at 36, 38.) He further testified that when he saw the shackles it was "inadvertent." (E.H.T. at 38.) As he described it, "I didn't sit there and look at them much. I just observed them" (E.H.T. at 34.) He further indicated, "I recall seeing something, but I didn't study it. It didn't just direct my attention over there." (E.H.T. at 38.)

Barbara Mona testified that, on one occasion as she was leaving the courtroom, she saw leg restraints on the petitioner. (E.H.T. at 45.) She testified that her recollection of what she was saw was vague, indicating as follows "It seemed like they were kind of like a chain type of thing, looked like, but I'm not sure. I can't remember. It seemed like there was something around the ankles." (E.H.T. at 45.) Furthermore, she was clear that she saw the shackles only once, testifying as follows "Just as I was walking out I just happened to look over in that direction and the defendant's lawyer was not seated at the table and I just saw it. I didn't think anything of it other than that. I didn't ever really remember it to tell you the truth until somebody from the Justice Department called." (E.H.T. at 50.)

Based on the foregoing testimony, the petitioner was not subjected to shackling so pervasive or conspicuous as to give rise to a presumption of prejudice. The testimony

most indicative of prejudice was that of Todd Medwed. However, Medwed's testimony is not credible. As noted above, Medwed testified that on a number of occasions the petitioner was brought into the courtroom *after* the jury was seated and wearing both handcuffs and leg shackles. (E.H.T. at 21, 23-24, 33.) Every other juror who testified, however, indicated that the petitioner was always brought into the court and placed at the defense table *before* the jury was brought in and that the petitioner did not walk in front of the jury wearing leg shackles. (E.H.T. at 40-41, 49, 53-54, 58, 60, 67, 72, 78.) The petitioner himself confirmed this, even though doing so is against his interest here. (E.H.T. at 109, 123.) Furthermore, no other juror testified that he ever saw the petitioner wearing handcuffs, and the petitioner testified that he was not regularly brought before the jury wearing handcuffs (E.H T at 119.)

The Court is not required to believe Medwed's testimony. In *Duckett v. Godinez*, 109 F.3d 533 (9th Cir. 1997), the Ninth Circuit held that where jurors give conflicting testimony at an evidentiary hearing, the court is entitled to base its factual findings on the more credible version of events. In that case, as in this one, one juror testified that the petitioner had stood and walked in front of the jury while shackled. 109 F.3d at 534. This testimony contradicted that of the other witnesses, all of whom testified that the petitioner did not walk in front of the jury with shackles but was seated every time the jury was brought into court. *Id.* at 535. Under those circumstances, the Ninth Circuit upheld the district court's decision to discount the testimony of the one juror who testified that he saw the defendant walk with shackles. *Id.* In the present case, Medwed's testimony is contradicted by that of seven

other jurors and the petitioner himself. Therefore, Medwed's testimony is not credible and should be discounted for purposes of the Court's factual findings.

Based on the balance of the testimony, the petitioner was subjected to minimal shackling in the presence of the jury, and this shackling was inconspicuous. Each time the jury was brought into court, the petitioner already was seated and any handcuffs already had been removed. The petitioner did wear leg shackles throughout the trial. These shackles consisted of a cuff around each ankle connected by a single chain. (E.H.T. at 104.) The ankle cuffs were covered [sic] the petitioner's pants. (E.H.T. at 121.) For the most part, the petitioner remained seated throughout the proceedings at defense table, located on the far side of the courtroom from the jury box. (E.H.T. at 41.) The one exception occurred when the petitioner testified, but he was placed on the witness stand before the jury came into the courtroom. (E.H.T. at 50, 67.) No juror testified that the petitioner's shackles were visible while the petitioner sat in the witness chair. Furthermore, the shackles were removed during his testimony when the petitioner had to get up from the witness stand in order to refer to a map (E.H.T. at 106.) At least one juror specifically remembered the petitioner moving around the courtroom during his testimony without shackles on. (E H.T at 73.) The Petitioner did testify to one incident when, during a recess, he was being removed from the courtroom in handcuffs and leg shackles. At that moment, two jurors came back into the courtroom to retrieve items they had left behind. The petitioner testified that these two jurors saw him handcuffed and shackled. (E.H.T. at 118.) He did not identify the jurors, and no juror corroborated this incident.

Therefore, discounting the testimony of Todd Medwed, the sum total of the evidence that jurors saw the shackles was the testimony of Eric Takamine that he saw the leg shackles "occasionally" and "inadvertently;" the testimony of Barbara Mona that she saw the shackles once, briefly, and the uncorroborated testimony of the petitioner that two jurors saw him in handcuffs and shackles during a recess. Each of these viewings of the shackles by jurors was brief and inadvertent, and at least five jurors sat through the entire seven week trial and did not see the shackles at all. The shackling, therefore, was minimal and inconspicuous. Accordingly, there is no *presumption* of prejudice in this case.

In the absence of such a presumption, the petitioner must make an affirmative showing of actual prejudice. *U.S. v. Olano*, 62 F.3d 1180, 1190 (9th Cir. 1995); *U.S. v. Halliburton*, 870 F.2d 557, 560-61 (9th Cir. 1989). The petitioner has not done so. In *Rhoden v. Rowland*, 172 F.3d 633 (9th Cir. 1999), the Ninth Circuit found that an affirmative showing of prejudice had been made where five jurors reported having seen the shackles, the jurors discussed the shackles among themselves, the petitioner testified to having suffered physical and emotional pain as a result of the shackles, and the petitioner's propensity for violence was an issue in the case. 172 F.3d at 636-67. Here, as in *Rhoden*, the petitioner testified that he suffered discomfort as a result of his shackles (E.H.T. at 113), and the petitioner's propensity for violence was at issue during the trial. However, unlike in *Rhoden*, only two jurors – Takamine and Mona – testified reliably that they saw the shackles, and every juror who testified indicated that there was no discussion among the jurors about the shackles (E.H.T. at 32, 38, 53, 63, 67-68, 73-74, 79-80).

Furthermore, the Ninth Circuit has indicated elsewhere that the Court should look to whether any cautionary instruction was given to the jury regarding the shackles, as such an instruction would tend to negate any prejudice caused by the shackles. *Halliburton*, 870 F.2d at 562, *Wilson*, 770 F.2d at 1485. In this case, the following instruction was given to the jury

> The fact that physical restraints have been imposed on defendant Hite must not be considered by you for any purpose. They are not evidence of guilt, and must not be considered by you as any evidence that he is more likely to be guilty than innocent. You must not speculate as to why restraints have been imposed. In determining the issues submitted to you, disregard this matter entirely.

(Clerk's Transcript at 220.) The Court presumes that the jury followed this instruction, *U.S. v. Olano*, 507 U.S. 725, 740 (1993), and the fact that the instruction was given tends to show that the petitioner was not prejudiced by the shackles.

Finally, the Ninth Circuit has indicated that, in addition to the foregoing factors, the Court must look to the strength of the evidence against the petitioner to determine whether the petitioner was prejudiced by being shackled. *Castillo v. Stainer*, 983 F.2d 145, 149 (9th Cir. 1992), *amended by* 997 F.2d 669 (9th Cir. 1993). In this case, the prosecution presented substantial circumstantial evidence which gave rise to a strong inference of guilt.

At trial, eyewitnesses testified that Kislo was killed by a prowler who entered Haymaker's backyard, hid in some bushes, and then shot Kislo when he went into the backyard to investigate. (R.T. at 539-40, 547-48, 574, 2098,

2106-07.) Although the gunman who shot Kislo could not be positively identified, the witnesses who saw the prowler on the night of the shooting indicated that the man who entered Haymaker's backyard resembled the petitioner in stature and build. (R T. at 552-53, 662-64, 2108.) They were able to observe him from within twenty feet. (R T. at 542.) The prowler came into the backyard by climbing over the fence that separated Haymaker's yard from the yard of the petitioner's mother, who lived on the adjoining property. (R.T. at 539-42, 2106, 2109.) The petitioner had a history of prowling around Haymaker's house and property, driven by the belief that she was seeing other men and that he would catch her with someone. (R T. at 1937, 1940-44, 1963-65, 2008-18, 2039-56.)

Indeed, Haymaker testified that the petitioner had an ongoing paranoia about her being unfaithful and that this paranoia resulted in several incidents when the petitioner would fly into a rage and become physically and psychologically abusive toward her. (R.T. at 1931-34, 1937, 1983-88, 1995-96, 2000, 2011-18, 2021-36, 2039-56.) During these episodes, the petitioner would brandish a handgun and would threaten to kill Haymaker and her male acquaintances. (R.T. at 2011-16, 2028-30, 2039-43, 2054-55, 2058-59.) In fact, approximately three weeks before the murder, the petitioner told Haymaker's father, Fred Lyon, that the petitioner was going to kill "that cop across the street," which Lyon understood to mean Kislo. (R.T. at 510, 654.) Furthermore, on at least one other occasion, the petitioner expressed his willingness to use deadly force generally, indicating that if he ever found an intruder in either his mother's backyard or in Haymaker's backyard, he would shoot them. (R.T. at 479.)

Before the murder, the petitioner owned an unregistered handgun, which he carried with him frequently. (R.T. at 1944-47, 1965-66, 2741, 2772, 2780, 2784-85, 2788-89.) At trial, the petitioner testified that the gun he had owned was a .45 caliber handgun. (R.T. at 2741.) However, at least one witness testified that the petitioner had said he owned a nine millimeter caliber handgun. (R.T. at 478.) After the murder, petitioner claimed that he no longer owned the gun but had sold it some months before. (R.T. at 2741.) One day after the murder, an abandoned nine millimeter handgun was found a few blocks from the murder scene under a bush by David Aylmer, a resident of the neighborhood who was out walking his dog. (R.T. at 929.) Haymaker testified that this gun looked like the gun which belonged to the petitioner, and the petitioner himself conceded that the gun looked exactly like his gun. (R.T at 1947, 2785-86)

A nine millimeter shell casing was found in Haymaker's backyard in the bushes from where the fatal shot was fired. (R T at 683-88.) This shell casing was identified through ballistics testing as being part of a round that was fired from the abandoned gun that was found by Aylmer. (R.T at 1263-68.) During one of the incidents when the petitioner brandished his handgun in front of Haymaker, he left behind a single, unfired round. (R T. at 2057.) Haymaker saved this bullet and gave it to the police after the killing. (R.T. at 2068-69.) Ballistics testing confirmed that this bullet at some point had been loaded into the abandoned gun found by Aylmer. (R.T. at 1310.)

The evidence, therefore, constituted a strong case against the petitioner and belies the notion that the viewing of the shackles played a role in the conviction. The shackles themselves were minimal and unobtrusive. Only

a few of the jurors even saw the shackles, and those who did saw them only in brief, inadvertent glimpses. The jurors did not discuss the shackles among themselves. The trial judge gave a cautionary instruction that the jurors should disregard the shackles. Based on all these facts, it is clear that the petitioner did not suffer legal prejudice by being shackled during his trial. As the petitioner has demonstrated neither cause and prejudice for his procedural default, nor a fundamental miscarriage of justice, his shackling claim must be deemed procedurally defaulted and should be denied as such.

3. Merits of the Shackling Claim

Even assuming the Court could reach the merits of the petitioner's constitutional claim, the claim would fail.

Shackling is constitutionally permissible where there are compelling circumstances which show that some measure is needed to maintain the security of the courtroom and where less restrictive alternatives to shackling are not available. *Duckett v. Godinez*, 67 F.3d 734, 748 (9th Cir. 1995) In this case, neither criterion is met. The trial court's decision to shackle the petitioner was based on the nature of the charges against the petitioner, his custodial status, and security concerns peculiar to the Malibu courthouse. At the beginning of the proceedings, Judge Mira noted on the record that the petitioner was being ordered shackled because of the "K10" custodial status that had been assigned him by the sheriff's department. (R.T. at 5) Later in the proceedings, Judge Mira indicated that the petitioner's K10 status was due to the nature of the charges against the petitioner – murder of a police officer. (R.T. at 852-53.) Still later, Judge Mira

reiterated that the petitioner was shackled "based upon the marshal's demonstrated purpose in security here." (R.T. at 3675.)

At the evidentiary hearing, it further was developed that Judge Mira had expressed concerns off the record about the relative lack of security at the Malibu courthouse. The Malibu courthouse, a municipal courthouse, was not well-equipped to handle a high-security, criminal case. (E.H.T. at 135.) The courtroom did not have a lock-up facility attached to it, and the courthouse did not have metal detectors. (E.H.T. at 135-36, 165.) The courtroom was situated within the courthouse such that a person would be able to exit the courtroom and then very quickly exit the courthouse without any difficulty or delay. (E.H.T. at 136, 165.) Finally, the courtroom was staffed with only one bailiff, and there was minimal security personnel in the rest of the courthouse. (E.H.T. at 136, 165.) Based on these concerns, Judge Mira ordered that the petitioner be shackled during trial. (E.H.T. at 137-38, 164-67.)

However, a trial judge may exercise his discretion to impose restraints only when confronted with a disruptive, contumacious, or stubbornly defiant defendant. *Tyars v. Finner*, 709 F.2d 1274, 1284 (9th Cir. 1983). The custodial status of a defendant is not sufficient grounds to justify shackling. *Duckett*, 67 F.3d at 749. Indeed, even a defendant who has been *convicted* may not be shackled during sentencing proceedings merely by virtue of the conviction. *Id.* A case in which the defendant has merely been *charged*, but not yet convicted, offers an even less compelling justification for the imposition of restraints. Shackling must be limited to cases urgently demanding that action. *Tyars*, 709 F.2d at 1284.

Furthermore, the law is clear that the justification for the shackling must be based on circumstances particular to the defendant in question. Thus, there must be evidence that the defendant has exhibited disruptive courtroom behavior, has attempted to escape from custody, has assaulted or attempted to assault someone while in custody, or has otherwise engaged in a pattern of defiant behavior toward correctional officials or judicial authorities. *Duckett*, 67 F.3d at 749. It is not enough that the defendant is being tried in a low-security facility. The characteristics of the building cannot make the defendant a candidate for shackling. Otherwise, *every* criminal defendant who is tried in a facility such as Malibu would be subject to being shackled.

Accordingly, the grounds upon which the petitioner was ordered shackled – the fact that he was charged with murdering a police officer, that he had been assigned a K10 custodial status by the sheriff's department, and that he was being tried at the low-security Malibu courthouse – were not the sorts of compelling circumstances under which shackling may be constitutionally imposed.

In addition, even assuming there was a manifest need for courtroom security, it does not appear from the record that the trial judge seriously contemplated less restrictive alternatives. To do so, the trial judge would had to have affirmatively assessed and weighed the benefits and burdens of shackling against other possible alternatives. *Jones v. Meyer*, 899 F.2d 883, 885 (9th Cir. 1990). If the alternatives to shackling are less onerous yet no less beneficial, the trial judge must opt for one of the alternatives. *U.S. v. Baker*, 10 F.3d 1374, 1401 (9th Cir. 1993). Shackles must be imposed only as a last resort. *Spain*, 883 F.2d at 728.

Toward the end of the proceedings, during the discussion of jury instructions, Judge Mira reflected back on his decision to impose shackles, noting, "As you may recall, we had some alternatives here. One was to put a large number of bailiffs in the court – two from the marshal's office and two in the audience – which is the practice of some courts." (R T. at 3675.) However, Judge Mira dismissed this option out of hand, indicating, "I think it makes it appear as if this case has some special status or celebrity when in fact it doesn't." (R T. at 3675-76.) Judge Mira did not indicate that the use of extra bailiffs, a less restrictive alternative to shackles, was unavailable or infeasible. Indeed, he expressly indicated that other judges employ precisely that practice. His only stated ground for not posting additional security personnel in the courtroom was that it gave the trial an appearance of notoriety. This is not the careful weighing of risks and benefits that the law requires. It appears from the record that Judge Mira's mind was fairly made up to impose shackles regardless of the availability of other alternatives. Testimony given at the evidentiary hearing supports the conclusion that Judge Mira was predisposed to impose shackles on the petitioner without any real consideration of alternatives. (E.H.T. at 152-53, 167.)

Therefore, shackles were not properly imposed in this case. However, shackling is subject to harmless error analysis. *Duckett*, 67 F.3d at 749. Under this analysis, a trial error will not require reversal of a conviction where the error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Thus, the reviewing court must consider what effect the constitutional error had upon the guilty verdict in the case at hand.

Sullivan v. Louisiana, 508 U.S. 275, 279 (1993). That is, harmless error review looks to the basis on which the jury actually rested its verdict. *Id.* The inquiry is whether the guilty verdict actually rendered in this trial was attributable to the error. *Id.*

For the reasons discussed above, the guilty verdict in this case was not attributable to the shackling of the petitioner. The shackles were so inconspicuous that several jurors sat through the entire seven week trial and never even saw the shackles. The few jurors who did see the shackles caught only brief glimpses. The jurors did not discuss the shackles among themselves. The trial judge gave a cautionary instruction that the jurors should disregard the shackles, and the Court must assume that this instruction was followed. Finally, there was substantial evidence of the petitioner's guilt. Under those circumstances, while the trial court's decision to impose shackles on the petitioner may have been erroneous, it was harmless error.

C. Ground Two: Prosecutorial Misconduct

In Ground Two of the Amended Petition, the petitioner argues that several statements made by the prosecutor during trial, in the presence of the jury, constituted prosecutorial misconduct. (Amended Petition at 30-37.) In particular, the petitioner points to the following seven instances of alleged misconduct by the prosecutor

1. At one point, Haymaker testified that if she had handled matters differently in relation to the petitioner it might have led to her death. The prosecutor responded, "That's right. Maybe it would be

you lying in the pool of blood in your backyard." (R.T. at 2265.)

2. In his closing argument, the prosecutor mistakenly referred to the petitioner as "William Hite, Jr.," which is actually the name of the petitioner's son. After realizing his mistake and correcting himself, the prosecutor turned to the son, who was sitting in the gallery, and said "You haven't killed anybody yet." (R.T. at 3896.)

3. At one point during his testimony, the petitioner indicated that he did not like the prosecutor. The prosecutor responded, "I don't like cop killers, Mr. Hite." (R.T. at 2812.)

4. The prosecutor badgered and taunted the petitioner by challenging him to a fight, asking the petitioner, "Do you want to take a piece of me, Mr. Hite? Do you want to take a swing at me?" (R.T. at 2811.)

5. During closing argument, the prosecutor used epithets in referring to the petitioner, describing him as a "sociopath," a "homicidal maniac," and an "animal." (R.T. at 3802, 3900, 3904.)

6. The prosecutor improperly appealed to the fears of the jury by stating during closing argument that he, his wife, and the people of the State of California "will sleep a lot better at night knowing that this animal is where he belongs." (R T. at 3904.)

7. During closing argument, the prosecutor sought to turn the trial into a test of his credibility against the credibility of the defense attorney, asserting that the prosecution is interested both in punishing the guilty and protecting the innocent whereas the only interest of defense counsel is "to

> get his client off no matter if he's guilty or not." (R.T. at 3897-98.)

Each of these instances of alleged prosecutorial misconduct was presented to the California state courts, and those courts found, upon addressing the merits of the petitioner's claim, that he was not entitled to relief. (Answer, Exs. A & C.) Accordingly, the deferential standard of review set forth in 28 U.S.C. § 2254(d) applies to this claim.

A prosecutor has a duty to refrain from using improper methods to procure a conviction. *U.S. v. Hill*, 953 F.2d 452, 458 (9th Cir. 1991). The prosecutor's job is not just to win, but to win fairly, staying well within the rules. *U.S. v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993). Where a prosecutor obtains a conviction by stepping outside those rules, the conviction is subject to challenged based on prosecutorial misconduct. *Id.* Inappropriate comments by the prosecutor in the presence of the jury may constitute prosecutorial misconduct. *Darden v. Wainwright*, 477 U.S. 168, 179-80 (1986). However, in order for a habeas petitioner to be entitled to relief, it is not enough that the prosecutor's remarks were undesirable or even universally condemned. *Id.* Rather, the determinative inquiry is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Id.* In deciding that question, it is appropriate to consider whether the jury was instructed to decide solely on the basis of the evidence rather than counsel's arguments, and whether the state's case was strong. *Furman v. Wood*, 190 F.3d 1002, 1006 (9th Cir. 1999).

It is relevant that in this case the majority of the prosecutor's comments which the petitioner complains of did not manipulate or misstate the evidence or implicate some specific constitutional right, such as the right to remain silent. *Darden*, 477 U.S. at 181-82. Rather, the basis for the petitioner's prosecutorial misconduct claim is simply the inflammatory nature of the prosecutor's remarks. In such cases, it is difficult for the petitioner to establish that the fundamental fairness of the proceedings was adversely affected. *Id.*

The petitioner complains first about the prosecutor's remark to Haymaker, implying that she had narrowly escaped death at the hands of the petitioner. This comment was unnecessary and purely speculative. However, the comment also came on the heels of extensive testimony by Haymaker about the petitioner's severely abusive conduct towards her. Haymaker testified that the petitioner had tied her up (R.T. at 2041), had placed a gun at her temple (R.T. at 2011-13), had threatened to force her to ingest a lethal dose of drugs (R.T. at 2041), had struck her forcefully in the head several times (R.T. at 2043-44), and had pointed a gun at her and pulled the trigger (R.T. at 2058-59). In light of this testimony, the prosecutor's comment could have had little further impact on the jury.

The petitioner also complains about the prosecutor's sarcastic aside to the petitioner's son in the gallery and the petitioner's confrontational challenge to the petitioner on the witness stand. In both instances, the prosecutor showed himself to be unprofessional. However, neither statement elicited a response, and the challenge to the petitioner arose from a comment which the petitioner himself initiated. (R.T. at 2811. 10-18.) The comments may have adversely affected the prosecutor's own credibility

with the jury, but they did not affect the fairness of the trial.

Next, the petitioner points out that the prosecutor, at various times, called him a "cop killer," a "sociopath," a "homicidal maniac," and an "animal." The use of such epithets generally does not amount to reversible misconduct. *See Darden*, 477 U.S. at 180-81 (no misconduct where prosecutor called defendant "animal"), *Furman*, 190 F.3d at 1005-06 (no misconduct where prosecutor called defendant "twisted, ugly, and vicious"), *Turner v. Marshall*, 63 F 3d 807, 818 (9th Cir. 1995) (no misconduct where prosecutor called defendant "monster")

The petitioner argues that the prosecutor improperly appealed to the fears of the jury during closing argument. A prosecutor may appeal to the jury to act as the "conscience of the community" *U.S. v. Williams*, 989 F.2d 1061, 1072 (9th Cir. 1993) In doing so, the prosecutor may not make statements specifically designed to inflame the jury. *Id.* However, even such inflammatory appeals to the jury will not be reversible if the comments, when considered in the context of the entire trial, could not have affected the jury's ability to judge the evidence fairly. *Id.* Here, the prosecutor's call for a verdict which would let the people of the State of California sleep better at night was close to the line between legitimate appeal to conscience and inflammatory. But, it was benign enough that the jury was not prevented from fairly judging the evidence.

Finally, the petitioner complains about the prosecutor's attack on the credibility of the defense attorney and his vouching for his own credibility. A prosecutor generally must not attack the credibility of opposing counsel. *Williams v. Borg*, 139 F.3d 737, 745 (9th Cir. 1998). However,

such comments will not infect the trial with unfairness where the evidence against the defendant is so dramatic that the jury could not have been distracted by the improper remarks. *Id.* A prosecutor also may not vouch for his own credibility. *U.S. v. Leon-Reyes*, 177 F.3d 816, 821-22 (9th Cir. 1999). Such misconduct will not be reversible, though, where the prosecutor does not assure the jury that any of the prosecution's witnesses were honest, where the prosecutor does not imply that he personally knows the defendant to be guilty, and where the vouching does not otherwise substantially affect the fairness of the proceedings. *Id.* None of those things occurred here.

In each instance, the prosecutor's comments, sometimes unnecessary and sometimes even to be "universally condemned," *Darden, supra*, nevertheless did not so infect the trial, singly or collectively, as to deprive the petitioner of due process of law. The jury was instructed that, in deciding the petitioner's guilt or innocence, it should consider only the evidence presented and not the arguments of counsel. (R T at 456, 463, 3772, Clerk's Transcript at 218.) Furthermore, the weight of the evidence was strongly in favor of the prosecution. Based on the testimony at trial, the petitioner had both motive and the means to commit the crime. There was strong physical evidence linking him to the weapon and the weapon to the crime. Nothing suggests that the jury's verdict was based on anything other than the evidence, notwithstanding the prosecutor's comments.

Accordingly, the state courts' finding that the prosecutor's actions did not rise to the level of reversible prosecutorial misconduct was not contrary to or an unreasonable application of clearly established federal law, nor was it

based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d).

D. Ground Three: Ineffective Assistance of Counsel

In Ground Three of the Amended Petition, the petitioner argues that his trial attorney rendered ineffective assistance of counsel on a number of occasions. Essentially, the petitioner argues that his counsel was ineffective by failing to object to each of the instances of prosecutorial misconduct described above and by failing to object to the trial court's decision to shackle the petitioner. (Amended Petition at 37-44.) Each of these instances of alleged ineffective assistance of counsel was presented to the California state courts, and those courts found, upon addressing the merits of the petitioner's claim, that he was not entitled to relief. (Answer, Exs. A & C.) Accordingly, the deferential standard of review delineated above applies to this claim.

As noted earlier, a claim of ineffective assistance of counsel has two components: (1) the petitioner must show that counsel's performance was deficient, and (2) the petitioner must show that the deficient performance prejudiced his case. *Strickland*, 466 U.S. at 687. To establish deficient performance, the petitioner must show that his counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. To establish prejudice, the petitioner must show that counsel's deficient performance rendered the result of the proceedings unreliable or rendered the proceedings themselves fundamentally unfair. *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). At a minimum, this requires showing there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Both deficient performance *and* prejudice must be established to prevail on a claim of ineffective assistance of counsel. *Id.* at 687. If it is clear that the petitioner cannot establish prejudice, the claim must be denied regardless of whether counsel's performance was deficient. *Id.* at 697.

Here, it is clear that the petitioner was not prejudiced by the alleged deficiencies in his counsel's performance at trial. As discussed above, the prosecutor in this case made a number of comments in the presence of the jury which were arguably inappropriate. However, none of the comments was so egregious as to render the proceedings unfair and, hence, none amounted to prosecutorial misconduct. The failure of the petitioner's attorney to object to these comments, therefore, could not have been prejudicial. Similarly, the petitioner suffered no prejudice as a result of being shackled during the trial. Therefore, the failure of defense counsel to object to the shackling was itself harmless. In light of the substantial evidence against the petitioner, it is clear that the result of the proceedings would have been the same regardless of whether the petitioner's attorney had objected to the prosecutor's comments and the shackling. Accordingly, the state courts' finding that the petitioner did not receive ineffective assistance of counsel was not contrary to or an unreasonable application of clearly established federal law, nor was it based on an unreasonable determination of the facts.

E. Ground Four: Admission of Prior Bad Conduct Evidence

In Ground Four of the Amended Petition, the petitioner complains that the trial court erred in admitting testimony regarding his prior bad conduct. During the prosecution's rebuttal, the court admitted the testimony of Rebecca Allen, who was married to the petitioner for approximately ten years during the 1960's. As did Fredrica Haymaker, Allen essentially testified that the petitioner had a paranoia about her being unfaithful and that he was severely physically abusive. (R.T. at 3175-3200) The petitioner contends that this testimony by his ex-wife was irrelevant and unfairly prejudicial and, as such, was improperly admitted by the trial court. (Amended Petition at 44-46.) This claim was presented to the California state courts, and those courts found, upon addressing the merits of the petitioner's claim, that he was not entitled to relief. (Answer, Exs. A & C.) Accordingly, the deferential standard of review delineated above applies to this claim.

A federal court may entertain an application for a writ of habeas corpus by a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Violations of state laws are not cognizable in a federal habeas corpus petition. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). As a rule, challenges to state court evidentiary rulings raise only state law issues. *Id.* at 67-70. A federal court sitting in habeas can review an application of state law for an alleged constitutional violation. *Hernandez v. Ylst*, 930 F.2d 714, 719 (9th Cir. 1991). However, only the denial or misapplication of state procedures that results in the deprivation of a constitutional right will

warrant federal habeas relief. *Bonin v. Calderon*, 77 F.3d 1155, 1162 (9th Cir. 1996).

Under certain circumstances, the admission of evidence of prior bad acts *may* violate the Due Process Clause. *McKinney v. Rees*, 993 F.2d 1378, 1384 (9th Cir. 1993). However, admission of such evidence violates due process only if there are no permissible inferences the jury may draw from the evidence. *Houston v. Roe*, 177 F.3d 901, 910 n. 6 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 1168 (2000). Where the jury can draw at least some rational and relevant inference from the prior bad act evidence, the introduction of such evidence cannot be deemed as necessarily preventing a fair trial. *Jammal v. Van de Kamp*, 926 F.2d 918, 920-21 (9th Cir. 1991).

In this case, the testimony of Allen was admitted not during the prosecution's case-in-chief and not to prove that the petitioner had committed the murder but, rather, during the prosecution's rebuttal to refute certain defense evidence. The defense called several witnesses who testified regarding the petitioner's good character and disinclination to commit acts of violence, including Esther Chaidez, the petitioner's mother (R.T. at 2675), Gloria Tellez, the petitioner's sister (R.T. at 2611-14), Rosa Hite, the petitioner's more recent ex-wife (R.T. at 2498-2500), Freddy Hite, the petitioner's uncle (R.T. at 2727-28), William Hite, the petitioner's son (R.T. at 3124-28, 3132-35); Sandra Tellez, the petitioner's niece (R.T. at 2540, 2606-08); and Rita Orme, Denise Orme, and Joseph Sharkey, acquaintances of the petitioner. (R.T. at 2479, 2485, 2489-90).

By introducing the testimony of these witnesses, the defense placed at issue the petitioner's character and

propensity for violence. The prosecution was entitled to rebut their collective testimony by introducing the testimony of a witness who had personal knowledge that the petitioner in fact was aggressive and violent. The jury could draw a permissible inference from such testimony, and the evidence did not violate due process. Accordingly, the state courts' finding that the introduction of Rebecca Allen's testimony did not violate due process was not contrary to or an unreasonable application of federal law, nor was it based on an unreasonable determination of the facts.

Furthermore, even assuming that the admission of Rebecca Allen's testimony was constitutional error, the erroneous admission of prior bad act evidence is a "trial error" subject to harmless error review. *McKinney*, 993 F.2d at 1385. On habeas review, the test for harmlessness is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623. An error has no substantial and injurious effect on a verdict where the prosecution's evidence of guilt is overwhelming. *Id.* at 639. Here, as discussed at length above, the petitioner's conviction was amply supported by a substantial amount of evidence. As such any error that occurred when the trial court admitted the testimony of Rebecca Allen was harmless.

RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the District Court (1) issue an Order accepting and adopting this Report and denying the Petition for Writ of Habeas Corpus, and (2) enter judgment dismissing this action with prejudice.

DATED July 19, 2000.

/s/ Ralph Zarefsky
RALPH ZAREFSKY
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM J. HITE,	No. 01-55071
Petitioner-Appellant,	D.C. No. CV-97-8222-AHM
v.	Central District of California, Los Angeles
GARY LINDSEY, Warden; DANIEL E. LUNGREN, CA State Attorney General,	ORDER
	(Filed Jun. 4, 2002)
Respondents-Appellees.	

Before: BREYER, Circuit Judges KOZINSKI, GOULD and

The Petition for Rehearing is DENIED.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellant's Petition for Rehearing En Banc is also DENIED.